IN THE

Supreme Court of the United States

October Term, 1952

No. 404

WARNER D. ORVIS, HOMER W. ORVIS, FLOYD Y. KEELER, F. HOWARD SMITH, HAROLD A. ROUSSELOT, HENRY H. BALFOUR, J. ANTONIO ZALDUONDO, WILLIAM G. WIGTON, CLIFFORD J. DOERLE and HERBERT R. JOHNSON, doing business under the firm name and style of ORVIS BROTHERS & CO. and JOHN J. McCLOSKEY, JR., as City Sheriff of the City of New York,

Petitioners,

against

JAMES P. McGRANERY, Attorney General of the United States, as Successor to the Alien Property Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

DONALD MARKS,
Counsel for Petitioners.

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Respondent does not reach the issue in this case until the last point in his brief, when, at Page 41 and following, he considers the effect of this Court's decisions in the *Zittman* cases. Up to that point, respondent presents again, in revised form, the arguments which were rejected by this Court in the *Zittman* cases, and which, if adopted, would nullify the effect of those decisions. He urges again that

the policy of Congress, as disclosed in Section 34 of the Trading with the Enemy Act, adopted in 1946, was to immobilize enemy assets and thus prevent the acquisition of any interest therein by an unlicensed attachment creditor. He argues that the freezing program would be frustrated by the recognition of a property interest acquired by attachment process after the date of the Executive Order. These arguments lead to respondent's conclusion that petitioners did not acquire an "interest, right or title" in the attached property. They ignore the effect of *Zittman No. 1,* in which this Court held that such an attachment creditor has a valid lien upon the property sufficient to exclude the right of the Custodian to possession under a right, title and interest vesting order.

To the extent to which respondent's arguments have not been disposed of in petitioners' main brief, we shall deal with them here.

I.

In Part I of his brief, respondent makes an assumption as to the legislative policy of Congress with respect to the payment of creditors' claims, which is not justified by the history of the Trading with the Enemy Act. He argues that in enacting Section 34 in 1946, Congress indicated an intention that assets should be equitably distributed by the Custodian and that petitioners must seek their remedy under Section 34.

The argument ignores the fact that Section 34 deals only with "debt" claims, and that petitioners' is a "title" claim. Respondent ignores the specific proviso of Section 34(i) that no proceeding taken under Section 34 shall bar a person claiming an interest, right or title from proceeding under other sections of the Act. Thus, a "title" claimant may proceed both under Section 9(a) and under Section 34, and if his claim is not wholly satisfied by the return of the prop-

erty in which he claims an interest, his Section 34 claim is not prejudiced by the successful pursuit of his Section 9(a) claim.

In view of the fact that petitioners stand upon the proposition that their unlicensed attachment lien created an interest, right or title sufficient to support a Section 9(a) suit, respondent's extended argument as to the intent of Congress with respect to the distribution of assets to debt claimants is wholly beside the point.

II.

In Part II of his brief, respondent presents an elaborate argument to the effect that the objectives of freezing and the terms of the freezing order would plainly be violated by granting petitioners relief in this case.

At page 33 respondent argues that "it was a major purpose of freezing to preclude" the acquisition of a property interest by attachment after the freezing order. The reason, respondent says, was that "the inevitable delay in vesting some property should not be allowed to have the effect of reducing the amount ultimately available for governmental purposes. Equally plainly, it would be inequitable to let the extent of creditors' rights depend upon the time when the particular debtor's property was vested" (Resp. brief, p. 31).

This reasoning would give the freezing order the same legal effect as a res vesting order. But the Trading With the Enemy Act does not support this view. Property rights may be acquired by citizens in blocked property before res vesting. This Court's decision in *Zittman No. 1* makes this clear, and respondent concedes as much in noting at page 42 of his brief that the effect of the decision in *Zittman No. 1* is that as against the foreign debtor, the attachment and the judgment which it secures are valid.

Such property rights may not be brushed aside on the ground that it would have been desirable that vesting orders have retroactive effect to the date of freezing.

The short answer to respondent's argument that there is a conflict between the purposes of the freezing program and the position taken by petitioners in this case is found in the following language of Mr. Justice Jackson in *Zittman No. 1* (341 U. S. at 463):

> "Nothing in these state court proceedings have purported to frustrate the purposes of the federal freezing program. On the contrary, the effect of the State's action, like that of the federal, was to freeze these funds, to prevent their withdrawal or transfer to use of the German nationals. There is no suggestion that these attachment proceedings could in any manner benefit the enemy. The sole beneficiaries are American citizens whose liens are not derived from the enemy but are adverse to any enemy interests. And, if no federal freeze orders were in existence, these state proceedings would tie up enemy property and reduce the amounts available for enemy disposition. We agree with the Government's assurance to the Court of Appeals in the Polish Relief case that these proceedings, in view of the fact that they do not purport to control the Custodian in the exercise of the federal licensing power, or in the power to vest the *res* if he sees fit to do so for administration, are not inconsistent with the freezing program and we think they were not invalidated or considered in Propper v. Clark, supra."

Since this Court has recognized that there is no conflict with the purpose of the freezing program in the recognition of a valid unlicensed attachment lien, it necessarily follows that there is no such conflict when the lienor seeks the assistance of the Court under Section 9(a) of the Act to enforce

his lien, unless the Custodian at that point can show good cause in the administration of the vested property for withholding enforcement of such lien.

As to the terms of the freezing order, we turn again to the conclusion of this Court in the *Zittman* cases that Executive Order 8389 as amended by Executive Order 8785, 6 F. R. 8297, did not prevent the acquisition of a valid attachment lien without a license. Mr. Justice Jackson considered this argument carefully, observing that "* * * consistent administrative practice treated attachments such as we have here as permissible and valid at the time they were levied" (341 U. S. at 458).

Respondent again urges that *Propper* v. *Clark*, 337 U. S. 472, warrants the conclusion that the language of the freezing order prohibited the acquisition of a valid attachment lien because it forbade "transfers of credit" (see Brief, p. 34). We submit that this again is disposed of by the decisions in the *Zittman* cases. However, it may be noted, in addition, that the levy of an attachment is not a dealing in or transfer of an evidence of indebtedness or an evidence of ownership of property within the meaning of the Executive Order. We further contend that the acquisition of such a lien is not a "transfer" within the meaning of the Order. Thus, the basis for respondent's argument that the acquisition of the attachment lien violated the terms of the freezing order is without force or substance and is, in essence, an attempt to relitigate *Zittman No. 1.*

Respondent argues in Section C of Part II of his brief that we assert that by General Ruling No. 12 and the accompanying practice of the Treasury Department, the attachment was licensed. We have not made such an argument but, on the contrary, have claimed that the absence of a license did not prevent the acquisition of a valid property interest sufficient to support a Section 9(a) suit.

III.

In the last point in his brief, respondent argues that the question left open in the *Zittman* cases may only be answered in this case by the conclusion that the Custodian had the authority to disregard petitioners' attachment lien as a matter of general policy and without assigning any reason pertinent to the administration of the vested assets. Respondent argues that while the attachment lien may be valid as between the parties, it is not valid as against the Custodian and that petitioners "now seek, not recognition of a lien which freezes the funds so as to prevent a private transfer of them, but recovery from the Custodian of the entire interest in the funds" (Brief, p. 45).

What is the practical effect of the *Zittman* decisions if the Government is sustained here? Starting with the premise that the lien of an unlicensed attachment is entitled to "recognition", where does it leave the lienor to say that it may be ignored by the Custodian—not for good and sufficient reasons, but arbitrarily and as a matter of general policy?

We cannot believe that this Court will now say that the *Zittman* decisions were without practical significance. The question reserved in those cases necessarily places a burden on the Custodian to justify his refusal to recognize an unlicensed attachment lien. Absent such justification by the Custodian, the command of Section 9(a) clearly imposes a duty upon the District Court to order payment to the lienor.

This mandate of the statute may not be defeated by arguments of policy as to the purpose of the Treasury to preserve the interest of the United States in the fund or to apply it ratably among claimants. Mr. Justice Holmes dealt with similar arguments in *White* v. *Mechanics Securities Corporation*, 269 U. S. 283 in the following characteristic language:

> "The United States seized the property in question from an enemy and of course could do with it what

it liked. When it comes into court and seeks to appropriate it there is a natural notion that it has elected to use its power. Its power could not be denied if the Attorney General were the complete mouthpiece of its will. But whatever his authority it is subordinate to Congress; and Congress has more authentically declared the sovereign intent by the statute to which we have referred. The statute gives an absolute right to the suitor who comes within its terms, unqualified by any reservation of a superior lien in case the United States should be a rival creditor" (269 U. S. at 301).

The effect of recognizing petitioners' lien is not to remove all federal freezing controls, nor to frustrate the purpose of these controls, nor to violate the principle of equitable distribution as embodied in Section 34 of the Act. As has already been pointed out, Section 34 deals only with debt claims and it does not purport to place lien claims in the same category for purposes of distribution. As for respondent's foreboding that freezing controls will be nullified by upholding petitioners' claim, it should suffice to point out that this no more follows than that the controls have been frustrated by the recognition of property interests such as those dealt with in *Kaufman* v. *Societe Internationale, etc.*, 343 U. S. 156.

If the Custodian has any factual basis for opposing payment of a legitimate lien claim in a Section 9(a) suit, he has ample opportunity to present such reasons to the Court. It is not necessary to give him arbitrary and unrestricted power to disregard a single class of lien claims in order to preserve the structure of the freezing program.

We have here one narrow issue, the determination of which has been exaggerated by the Custodian out of all proportion to its importance in the administration of vested

assets. The Custodian's argument that the recognition of such unlicensed attachment liens will threaten the vesting program is palpably unreasonable.

IV.

In a footnote, on Page 5 of his brief, respondent asserts that if this Court should hold petitioners entitled to recover, the question of allowability of interest should be remitted to the Court of Appeals on remand for consideration. We submit that such a remand is unnecessary and would only lead to further delay in the termination of this litigation.

The District Court allowed interest on the authority of *People* v. *The State of New York* (*First Russian Ins. Co.*, 253 N. Y. 365). In that case, it was held that the Receiver, who took possession of the fund, did so subject to the attachment lien obtained by a creditor and that the attachment lien carried interest.*

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* The general principle as to allowance of interest covering a period when performance is suspended by the effect of war was stated by Mr. Justice Holmes in *Hicks* v. *Guinness*, 269 U. S. 71, as follows: "The denial of interest for the time covered by the war seems to us wrong. The cause of action had accrued before the war began, *Young* v. *Godbe*, 15 Wall. 562, 21 L. Ed. 250, and after it had accrued the question was no longer one of excuse for not performing a contract, but of the continuance of a liability for damages that had become fixed. The obligation of a contract is subject to implied exceptions, but when a liability is incurred by wrong or default it is absolute. Interest is due as one of its incidentals, and inability to pay it no more excuses from that than it does from the principal amount. Of course while the damages remain unpaid interest during one time is as necessary as interest during another to effect the indemnification to which the delinquent is held by the law. There are indications that local and momentary interests have led to a diversity of decisions but here again what we regard as principle has prevailed in later days, *Miller* v. *Robertson*, 266 U. S. 243, 45 S. Ct. 73, 69 L. Ed. 265; *Hugh Stevenson & Sons, Ltd.* v. *Aktiengesellschaft fur Cartonnagen-Industrie*, (1918) A. C. 239, 245; s. c. (1917) 1 K. B. 842, 850."

The allowance of interest is justified by decisions under the Trading with the Enemy Act, prior to World War II. See

Miller v. *Robertson*, 266 U. S. 243;
Sutherland v. *Kanawha Valley Bank*, 48 F. 2d 1027 (C. A. 4th).

It should also be noted that interest was paid to the attachment creditor in *Murray Oil Products* v. *Mitsui Co. Ltd.*, 55 Fed. Supp. 353, aff'd 146 Fed. (2d) 381. There, the order entered on consent of the Custodian on February 21st, 1945 provided for payment of interest and Sheriff's fees (R. 38, Civil Action 18-459 S. D. N. Y.). Respondent attempts to minimize the significance of this case by an observation in a footnote at Page 41 of his brief that the Custodian and the Department of Justice "did not deem that case a suitable vehicle in which to make the first test of the validity of unlicensed New York attachments." It is just such arbitrary distinctions by administrative officials which subvert the constitutional policy that our Government shall be one of laws, not men. The position taken by the Custodian is justified neither by past administrative practice nor by sound statutory interpretation. There is no occasion for remanding this cause to the Court of Appeals for further consideration. On the record, the District Court correctly granted petitioners' motion for summary judgment and that order should be reinstated.

Respectfully submitted,

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Counsel for Petitioners.

Dated: January 31, 1953.